

Nov 19, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

FELIPE S.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

No. 1:18-CV-03184-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 17, 19. Attorney D. James Tree represents Felipe S. (Plaintiff); Special Assistant United States Attorney Jeffrey R. McClain represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 4. After reviewing the administrative record and the

¹Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for
2 Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and
3 **REMANDS** the matter to the Commissioner for additional proceedings pursuant to
4 42 U.S.C. §§ 405(g), 1383(c).

5 **JURISDICTION**

6 Plaintiff filed applications for Supplemental Security Income (SSI) and
7 Disability Insurance Benefits (DIB) on October 20, 2014, Tr. 99-100, alleging
8 disability since September 20, 2008, Tr. 252, 254. The applications were denied
9 initially and upon reconsideration. Tr. 147-67. Administrative Law Judge (ALJ)
10 Kimberly Boyce held a hearing on June 1, 2017 and heard testimony from Plaintiff
11 and vocational expert Kelly Hember.² Tr. 58-98. The ALJ issued an unfavorable
12 decision on November 1, 2017. Tr. 28-41. The Appeals Council denied review on
13 July 16, 2018. Tr. 1-4. The ALJ's November 1, 2017 decision became the final
14 decision of the Commissioner, which is appealable to the district court pursuant to
15 42 U.S.C. §§ 405(g), 1383(c). Plaintiff filed this action for judicial review on
16 September 18, 2018. ECF No. 1.

17 **STATEMENT OF FACTS**

18 The facts of the case are set forth in the administrative hearing transcript, the
19 ALJ's decision, and the briefs of the parties. They are only briefly summarized
20 here.

21 Plaintiff was 47 years old at the alleged date of onset. Tr. 252. Plaintiff
22 completed his GED. Tr. 542. He reported chronic anxiety and depression as

23
24 ²Throughout the June 1, 2017 hearing, the ALJ and Plaintiff's counsel
25 referred to a previous hearing and relied on statements from that hearing being
26 made a part of the record. Tr. 61, 63, 92. The record includes a Notice of Hearing
27 for May 22, 2017. Tr. 194. However, there is no transcript from this hearing in
28 the record before the Court.

1 impairments that prevented him from working. Tr. 285. He attempted working
2 after the alleged date of onset, but reported he “was unable to keep [the] position”
3 due to his mental health impairments. Tr. 280.

4 **STANDARD OF REVIEW**

5 The ALJ is responsible for evaluating witness statements, resolving conflicts
6 in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d
7 1035, 1039 (9th Cir. 1995). The Court reviews the ALJ’s determinations of law de
8 novo, deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201
9 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if
10 it is not supported by substantial evidence or if it is based on legal error. *Tackett v.*
11 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
12 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
13 another way, substantial evidence is such relevant evidence as a reasonable mind
14 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
15 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
16 interpretation, the court may not substitute its judgment for that of the ALJ.
17 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
18 findings, or if conflicting evidence supports a finding of either disability or non-
19 disability, the ALJ’s determination is conclusive. *Sprague v. Bowen*, 812 F.2d
20 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
21 evidence will be set aside if the proper legal standards were not applied in
22 weighing the evidence and making the decision. *Browner v. Secretary of Health*
23 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

24 **SEQUENTIAL EVALUATION PROCESS**

25 The Commissioner has established a five-step sequential evaluation process
26 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
27 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
28 through four, the burden of proof rests upon the claimant to establish a prima facie

1 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
2 burden is met once the claimant establishes that physical or mental impairments
3 prevent him from engaging in his previous occupations. 20 C.F.R. §§ 404.1520(a),
4 416.920(a)(4). If the claimant cannot do his past relevant work, the ALJ proceeds
5 to step five, and the burden shifts to the Commissioner to show that (1) the
6 claimant can make an adjustment to other work, and (2) the claimant can perform
7 specific jobs which exist in the national economy. *Batson v. Comm’r of Soc. Sec.*
8 *Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant cannot make an
9 adjustment to other work in the national economy, he is found “disabled”. 20
10 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

11 **ADMINISTRATIVE DECISION**

12 On November 1, 2017, the ALJ issued a decision finding Plaintiff was not
13 disabled as defined in the Social Security Act from September 20, 2008 through
14 the date of the decision.

15 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
16 activity since September 20, 2008, the alleged date of onset. Tr. 30.

17 At step two, the ALJ determined that Plaintiff had the following severe
18 impairments: depression; posttraumatic stress disorder; personality disorder; and
19 substance addiction disorder. Tr. 31.

20 At step three, the ALJ found that Plaintiff did not have an impairment or
21 combination of impairments that met or medically equaled the severity of one of
22 the listed impairments. Tr. 31.

23 At step four, the ALJ assessed Plaintiff’s residual function capacity and
24 determined he could perform work at all exertional levels with the following
25 limitations:

26 In order to meet ordinary and reasonable employer expectations
27 regarding attendance, production and work place behavior, the claimant
28 can understand, remember and carry out unskilled, routine and

1 repetitive work that can be learned by demonstration, and in which
2 tasks to be performed are predetermined by the employer. He can cope
3 with occasional work setting change and occasional interaction with
4 supervisors, can work in proximity to coworkers, but not in a team or
5 cooperative effort. The claimant can perform work that does not
6 require interaction with the general public as an essential element of the
7 job, but occasional incidental contact with the general public is not
8 precluded.

9 Tr. 33. The ALJ identified Plaintiff's past relevant work as telephone maintenance
10 mechanic and found that he could not perform this past relevant work. Tr. 40.

11 At step five, the ALJ determined that, considering Plaintiff's age, education,
12 work experience and residual functional capacity, and based on the testimony of
13 the vocational expert, there were other jobs that exist in significant numbers in the
14 national economy Plaintiff could perform, including the jobs of industrial
15 sweeper/cleaner, "laborer, stores," and conveyor feeder offbearer. Tr. 40-41. The
16 ALJ concluded Plaintiff was not under a disability within the meaning of the Social
17 Security Act from September 20, 2008, through the date of the ALJ's decision. Tr.
18 41.

19 ISSUES

20 The question presented is whether substantial evidence supports the ALJ's
21 decision denying benefits and, if so, whether that decision is based on proper legal
22 standards. Plaintiff first argues that the Appeals Council failed to properly
23 consider the evidence submitted following the hearing. ECF No. 17 at 5-8.
24 Plaintiff then argued that the ALJ erred by failing to properly address the opinion
25 evidence and failing to properly weigh Plaintiff's symptom statements. *Id.* at 8-21.

26 DISCUSSION

27 1. Evidence Submitted to Appeals Council

28 Plaintiff argues that the Appeals Council failed to consider or exhibit new
evidence that was submitted following the ALJ's unfavorable decision. ECF No.
17 at 5-8.

1 The Appeals Council will only consider additional evidence if the claimant
2 shows good cause for not submitting the evidence prior to the ALJ hearing. 20
3 C.F.R. §§ 404.970(b); 416.1470(b). Specifically, “the Appeals Council receives
4 additional evidence that is new, material, and relates to the period on or before the
5 date of the hearing decision, and there is a reasonable probability that the
6 additional evidence would change the outcome of the decision.” 20 C.F.R. §§
7 404.970(a)(5); 416.1470(a)(5).

8 “[W]hen a claimant submits evidence for the first time to the Appeals
9 Council, which considers that evidence in denying review of the ALJ’s decision,
10 the new evidence is part of the administrative record, which the district court must
11 consider in determining whether the Commissioner’s decision is supported by
12 substantial evidence.” *Brewes v. Comm’r of Soc. Sec. Admin.*, 682 F.3d 1157,
13 1159-60 (9th Cir. 2012). “Where the Appeals Council was required to consider
14 additional evidence, but failed to do so, remand to the ALJ is appropriate so that
15 the ALJ can reconsider its decision in light of the additional evidence.” *Taylor v.*
16 *Comm’r*, 659 F.3d 1228, 1233 (9th Cir. 2011). When considering the new
17 evidence, the district court first determines whether the Appeals Council was
18 required to consider the new evidence. *See id.* at 1231.

19 Plaintiff submitted multiple records to the Appeals Council following the
20 unfavorable ALJ decision, including three opinions from Nora Marks, Ph.D. dated
21 January 9, 2015, January 16, 2016, and December 6, 2017. Tr. 20-24, 48-57.

22 **A. January 9, 2015 Examination**

23 Following a January 9, 2015 examination, Dr. Marks opined that Plaintiff
24 had a severe limitation in the abilities to maintain appropriate behavior in a work
25 setting and set realistic goals and plan independently. Tr. 55. She also opined that
26 Plaintiff had an additional four marked limitations and six moderate limitations in
27 basic work activities. *Id.*

28 This opinion was a part of the record prior to the ALJ’s hearing. Tr. 757-61,

1 773-77. The ALJ addressed it in detail in her decision and assigned it little weight.
2 Tr. 38. Therefore, the Appeals Council did not need to address this opinion when
3 denying Plaintiff's request for review.

4 **B. January 16, 2016 Examination**

5 The Appeals Council was required to address the January 16, 2016
6 examination. Following the examination, Dr. Marks provided the same functional
7 opinion as in January 2015. Tr. 50.

8 While the opinion predated the ALJ's hearing, it was not submitted until
9 after the ALJ's decision. At the June 1, 2017 hearing the ALJ inquired whether the
10 record was complete to the best of counsel's knowledge. Tr. 61. Counsel
11 responded with "I believe it is with the caveats or whatever that I put on the record
12 at our last hearing, yes." *Id.* The transcript from this earlier hearing is absent from
13 the record. Therefore, the Court cannot determine if Plaintiff notified the ALJ of
14 the missing evidence that was later submitted to the Appeals Council in accord
15 with 20 C.F.R. §§ 404.935(a); 416.1435(a) (requiring the claimant to notify the
16 ALJ of all evidence five days prior to the hearing). Because of this, the Court
17 cannot determine whether Plaintiff was required to meet the good cause standard
18 set forth in 20 C.F.R. §§ 404.970(b); 416.1470(b) for the late submission of the
19 opinion.

20 However, this opinion is new and material as it addresses a period prior to
21 the ALJ's decision. The Appeals Council did not exhibit the evidence because it
22 did not show a reasonable probability that it would change the outcome of the
23 decision. Tr. 2. This Court joins others in finding that it is not clear how the
24 Appeals Council determined that the new evidence would not impact the outcome
25 while simultaneously not considering it and not associating it with the record.
26 *McLaughlin v. Saul*, No. 1:18-cv-00967-SKO, 2019 WL 3202806, at *5 (E.D. Cal.
27 July 16, 2019) citing *Deliny S. v. Berryhill*, No. CV 17-06328-DFM, 2019 WL
28 1259410, at *1 (C.D. Cal. Mar. 19, 2019) and *Mayeda-Williams v. Comm'r of Soc.*

1 *Sec. Admin.*, No. 18-0009-HRH, 2019 WL 157918, at *5 (D. Ak. Jan. 10, 2019);
2 *Lena J. v. Comm'r of Soc. Sec. Admin.*, No. C18-6007-RLB-BAT, 2019 WL
3 3291039, at *3 (W.D. Wash. July 1, 2019). Therefore, the Appeals Council erred
4 in failing to associate the evaluation with the record.

5 The Court acknowledges that the entire evaluation and opinion is identical to
6 the January 9, 2015 examination except the signature line has a new evaluation
7 date and signature date. Tr. 78-52. However, because the Appeals Council was
8 also required to consider the opinion following the December 6, 2017 examination,
9 *see infra.*, the Court refers any factual finding regarding the identical evaluations to
10 the ALJ on remand.

11 **C. December 6, 2017 Examination**

12 The Appeals Council was also required to consider Dr. Marks' December
13 15, 2017 opinion. *See* Tr. 20-24. This opinion was penned on December 15, 2017
14 following the December 6, 2017 examination, which was just over a month after
15 the ALJ's decision. Therefore, there was no requirement that Plaintiff demonstrate
16 good cause for submitting the evidence under 20 C.F.R. §§ 404.935(a);
17 416.1435(a). Plaintiff was required to submit the evidence in accord with 20
18 C.F.R. §§ 404.1512(a); 416.912, which requires that a claimant inform the agency
19 or submit all evidence known to the claimant regarding whether or not he is
20 disabled:

21 This duty is ongoing and requires you to disclose any additional related
22 evidence about which you become aware. This duty applies at each
23 level of the administrative review process, including the Appeals
24 Council level if the evidence relates to the period on or before the date
25 of the administrative law judge hearing decision.

26 20 C.F.R. §§ 404.1512(a); 416.912(a). Here, the evaluation took place after the
27 ALJ's decision, but it was related to the period on or before the date of the ALJ's
28 November 1, 2017 decision as required under 20 C.F.R. §§ 404.1512(a);

1 416.912(a). Dr. Marks compared Plaintiff's evaluation as of December 6, 2017 to
2 his prior evaluation, which predated the ALJ's decision. *See* Tr. 20-22 (first
3 stating Dr. Marks' prior observations then the current observations). Dr. Marks
4 stated that "He was too agitated and depressed, angry and irritable to complete any
5 self-assessments. His conditions are worsening. Trauma-based anxiety will be
6 added to his diagnoses." Tr. 22. Therefore, this evaluation shows disease
7 progression that can be attributed to the period prior to the ALJ's decision. *See*
8 *Smith v. Bowen*, 849 F.2d 1222, 1225 (9th Cir. 1988) ("reports containing
9 observations made after the period for disability are relevant to assess the
10 claimant's disability," and "medical reports are inevitably rendered retrospectively
11 and should not be disregarded solely on that basis."). Therefore, the Appeals
12 Council should have considered the evidence.

13 The Appeals Council should have addressed the opinion, and the failure to
14 do so justifies a remand. *See Taylor*, 659 F.3d at 1233. Upon remand, the ALJ
15 will also address the remaining evidence submitted to the Appeals Council,
16 including records from Thomas Jenkins, PA-C dated December 15, 2017 and
17 records from the State of Washington Department of Social and Health Services
18 dated December 18, 2017. Tr. 2.

19 **2. Opinion Evidence**

20 Plaintiff argues that the ALJ failed to properly consider and weigh the
21 opinions expressed by Nora Marks, Ph.D., Manuel Gomes, Ph.D., Daniel M.
22 Neims, Psy.D., Ana Zapien, B.A., and the Washington Division of Vocational
23 Rehabilitation. ECF No. 17 at 8-17.

24 In weighing medical source opinions, the ALJ should distinguish between
25 three different types of physicians: (1) treating physicians, who actually treat the
26 claimant; (2) examining physicians, who examine but do not treat the claimant;
27 and, (3) nonexamining physicians who neither treat nor examine the claimant.
28 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more

1 weight to the opinion of a treating physician than to the opinion of an examining
2 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
3 should give more weight to the opinion of an examining physician than to the
4 opinion of a nonexamining physician. *Id.*

5 When an examining physician's opinion is not contradicted by another
6 physician, the ALJ may reject the opinion only for "clear and convincing" reasons,
7 and when an examining physician's opinion is contradicted by another physician,
8 the ALJ is required to provide "specific and legitimate reasons" to reject the
9 opinion. *Lester*, 81 F.3d at 830-31.

10 **A. Nora Marks, Ph.D.**

11 The ALJ addressed Dr. Marks' opinion following the January 9, 2015
12 examination and assigned it little weight for four reasons: (1) Dr. Marks did not
13 review any records; (2) Plaintiff's statements during the evaluation were
14 inconsistent with his treatment records; (3) Dr. Marks relied on Plaintiff's
15 subjective statements; and (4) the opined severity was inconsistent with Plaintiff's
16 activities, minimal psychiatric observations, and performance on the mental status
17 examinations. Tr. 38-39.

18 Dr. Marks is an examining psychologist who administered the Beck Anxiety
19 Inventory, the Beck Depression Inventory, and a Mental Status Examination. Tr.
20 758, 760-61. The opinion following the January 9, 2015 examination is only the
21 first of three opinions in the record. Considering the case is being remanded for
22 the ALJ to address her other two opinions, the ALJ will also address this initial
23 opinion.

24 **B. Daniel M. Neims, Psy.D.**

25 Plaintiff also challenged the ALJ's treatment of the opinion of Dr. Neims.
26 ECF No. 17 at 14-15.

27 Dr. Neims completed a Review of Medical Evidence form for the
28 Washington Department of Social & Health Services on January 24, 2015. Tr.

1 644-45. He found that the diagnoses identified by Dr. Marks were only partially
2 supported by the objective medical evidence and that the severity and functional
3 limitations were not supported by available medical evidence. Tr. 644. He opined
4 that the overall medical evidence only supported an eight-month duration. Tr. 645.

5 The ALJ gave this opinion little weight because it was based on the January
6 9, 2015 examination by Dr. Marks and the resulting opinion. Tr. 39. Dr. Neims
7 only reviewed Dr. Marks' January 9, 2015 evaluation. Tr. 644. However, since
8 the ALJ is instructed to readdress all of Dr. Marks' opinions in record, she will also
9 readdress Dr. Neims' opinion.

10 **C. Manuel Gomes, Ph.D.**

11 Plaintiff challenged the ALJ's treatment of Dr. Gomes' opinion. ECF No.
12 17 at 13-14.

13 On August 14, 2015, Dr. Gomes completed a consultative examination at the
14 request of the Social Security Administration. Tr. 765-72. Dr. Gomes went
15 through eight mental functional abilities and summarized Plaintiff's statements
16 regarding each functional limitation. Tr. 771-72.

17 The ALJ assigned the evaluation partial weight noting that Dr. Gomes
18 simply "described the claimant's subjective statements when assessing the
19 claimant's abilities, which are not fully consistent with the medical evidence of the
20 record," but that "nothing [in] his opinion indicates the claimant is more
21 significantly limited than I have concluded in the above residual functional
22 capacity." Tr. 38. Since the case is being remanded for additional proceedings to
23 address the other opinions in the record, the ALJ will readdress Dr. Gomes'
24 evaluation.

25 **D. Ana Zapien, B.A.**

26 In April of 2016, Ms. Zapien completed an Outpatient Service
27 Reauthorization form in which she stated that Plaintiff's "symptoms interfere with
28 him being able to sustain a job." Tr. 919. The ALJ did not address Ms. Zapien's

1 statement in her decisions. Tr. 28-41. Plaintiff argues that this failure to address
2 the opinion was an error. ECF No. 17 at 15.

3 Ms. Zapien does not qualify as an acceptable medical source. 20 C.F.R. §§
4 404.1502, 416.902. However, lay witness testimony is “competent evidence” as to
5 “how an impairment affects [a claimant’s] ability to work.” *Stout v. Comm’r, Soc.*
6 *Sec. Admin.*, 454 F.3d 1050 (9th Cir. 2006); *see also Dodrill v. Shalala*, 12 F.3d
7 915, 918-19 (9th Cir. 1993). An ALJ must give “germane” reasons to discount
8 evidence from these “other sources.” *Dodrill*, 12 F.3d at 919.

9 Here, the ALJ failed to provide any reason, germane or otherwise, for not
10 adopting Ms. Zapien’s statement. Therefore, the ALJ will address Ms. Zapien’s
11 statement on remand.

12 **E. Division of Vocational Rehabilitation**

13 In March 2013, the Division of Vocational Rehabilitation (DVR) completed
14 a Case Narrative form addressing Plaintiff’s work tolerance, communication, and
15 interpersonal abilities. Tr. 588-96. The ALJ assigned the functional limitations
16 little weight because DVR used different criteria for its findings and the form was
17 not signed by the evaluators. Tr. 39.

18 A determination made by another government agency regarding whether or
19 not a claimant is disabled is not binding on the ALJ. 20 C.F.R. §§ 404.1504;
20 416.904. The Social Security Program Operations Manual System states:

21 We consider evidence of decisions by other governmental agencies and
22 nongovernmental entities as evidence from a nonmedical source. We
23 also consider all of the supporting evidence underlying the other
24 governmental agency or nongovernmental entity’s decision that we
25 receive according to the appropriate category of evidence in DI
26 24503.005 Categories of Evidence. We are not required to adopt a
27 decision by any other governmental agency or a nongovernmental
28 entity.

POMS DI 24503.45. For claims filed before March 27, 2017, the ALJ is required

1 to explain the consideration given to such decisions. *Id.* Therefore, upon remand,
2 the ALJ will further address the DVR determination and the underlying evidence
3 that was considered in forming that determination.

4 **3. Plaintiff's Symptom Statements**

5 Plaintiff contests the ALJ's determination that Plaintiff's symptom
6 statements were unreliable. ECF No. 17 at 17-21.

7 It is generally the province of the ALJ to make determinations regarding the
8 reliability of Plaintiff's symptom statements, *Andrews*, 53 F.3d at 1039, but the
9 ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,
10 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,
11 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear
12 and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester*, 81
13 F.3d at 834. "General findings are insufficient: rather the ALJ must identify what
14 testimony is not credible and what evidence undermines the claimant's
15 complaints." *Lester*, 81 F.3d at 834.

16 The evaluation of a claimant's symptom statements and their resulting
17 limitations relies, in part, on the assessment of the medical evidence. *See* 20
18 C.F.R. §§ 404.1529(c); 416.929(c); S.S.R. 16-3p. Therefore, in light of the case
19 being remanded for the ALJ to address the additional medical evidence submitted
20 to the Appeals Council and readdress the opinions in the record, a new assessment
21 of Plaintiff's subjective symptom statements will be necessary.

22 **REMEDY**

23 Plaintiff asks the Court to apply the credit-as-true rule and remand this case
24 for an immediate award of benefits. ECF Nos. 17 at 21.

25 The decision whether to remand for further proceedings or reverse and
26 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
27 888 F.2d 599, 603 (9th Cir. 1989). Under the credit-as-true rule, where (1) the
28 record has been fully developed and further administrative proceedings would

1 serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons
2 for rejecting evidence, whether claimant testimony or medical opinion; and (3) if
3 the improperly discredited evidence were credited as true, the ALJ would be
4 required to find the claimant disabled on remand, the Court remands for an award
5 of benefits. *Revels v. Berryhill*, 874 F.3d 648, 668 (9th Cir. 2017). But where
6 there are outstanding issues that must be resolved before a determination can be
7 made, and it is not clear from the record that the ALJ would be required to find a
8 claimant disabled if all the evidence were properly evaluated, remand is
9 appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004);
10 *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

11 In this case, the additional medical evidence submitted to the Appeals
12 Council and the missing hearing transcript reveals that the administrative record is
13 not fully developed. Therefore, a remand for additional proceedings is appropriate.
14 The Commissioner will (1) exhibit all the evidence submitted to the Appeals
15 Council, (2) supplement the record with any additional outstanding medical
16 evidence, (3) locate the missing hearing transcript and make it a part of the record
17 if it is available, (4) readdress the opinion evidence in light of the record as a
18 whole, and (5) make a new determination regarding the reliability of Plaintiff's
19 symptom statements considering the record as a whole.

20 CONCLUSION

21 Accordingly, **IT IS ORDERED:**

- 22 1. Defendant's Motion for Summary Judgment, **ECF No. 19**, is
23 **DENIED**.
- 24 2. Plaintiff's Motion for Summary Judgment, **ECF No. 17**, is
25 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
26 additional proceedings consistent with this Order.
- 27 3. Application for attorney fees may be filed by separate motion.
- 28 The District Court Executive is directed to file this Order and provide a copy

1 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
2 and the file shall be **CLOSED**.

3 DATED November 19, 2019.



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JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE